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Supreme Court of the United States

OCTOBER TERM, 1968

No. 332

SOUTHERN RAILWAY COMPANY,
Petitioner,

versus

JOHN H. JACKSON,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT, JOHN H. JACKSON, IN OPPOSITION TO GRANTING OF CERTIORARI.

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QUESTIONS PRESENTED.

The trial court included in its charge a charge on contributory negligence and on comparative negligence (R. 654). The United States Court of Appeals for the Fifth Circuit held that it is improper for a court to instruct on a proposition of law about which there is no evidence. The court further held that such an in-

struction should be refused and that in this particular case, under the circumstances present, where the giving of this instruction improperly permitted the jury to find the plaintiff (respondent) guilty of comparative and contributory negligence, the giving of the instruction was prejudicial error. The U. S. Court of Appeals for the Fifth Circuit accordingly reversed the judgment of the District Court and remanded the cause for a new trial.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

Respondent respectfully submits that in addition to the constitutional provision and statutes set forth by the appellant, that Georgia Code Annotated, Section 18-201, is pertinent for the proper and adequate review of this case. Georgia Code Section 18-201 reads as follows:

> "Passenger defined.—A passenger is one who travels in some public conveyances by virtue of a contract, express or implied, with the carrier as to the payment of the fare or that which is accepted as an equivalent therefor. The prepayment of fare is not necessary to establish the relation of passenger. While a carrier may demand prepayment of fare, if, by its permission, persons enter his vehicle with the intention of being carried, an obligation to pay fare is implied on the part of the passenger, and the reciprocal liability of the carrier arises."

Respondent further respectfully submits that Georgia Code, Section 18-204, is pertinent to the proper review of this case. Georgia Code, Section 18-204 reads as follows:

> "Diligence required of carriers.—A carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers, but is not liable for injuries to them after having used such diligence."

STATEMENT OF FACTS.

Respondent respectfully submits that in addition to the statement of facts set forth by the petitioner in its petition for writ of certiorari, that there are other facts which are necessary for a proper review of this case.

The uncontradicted testimony of the Railway Postal Clerks riding in this car at the time of the collision and the uncontradicted testimony of the respondent, John Jackson, indicates that the first knowledge that Jackson had of an impending collision was when Mr. Billingsley had gone to the door and turned and hollered that they were going to have a collision and that this happened just a few seconds before the impact occurred. (R. 90, 140, 174, 208, 209, 210.)

The uncontroverted facts show that the two (2) trains involved in the collision belonged to the Southern Railway Company, petitioner herein, and collided head-on. (R. 40.)

The evidence clearly shows that the plaintiff had no knowledge of an impending accident (collision) until just a very few seconds before the collision actually took place. The time between the first knowledge by the plaintiff of an impending collision and the actual collision was estimated from thirty (30) seconds down to five (5) to eight (8) seconds. (R. 90, 140, 174, 208, 209, 210.)

The testimony of John Jackson is that when Mr Billingsley hollered that it was going to hit, he (Jackson) grabbed across two (2) racks. (R. 133.) The uncontradicted evidence shows that the light was red and that there was no question but that the engineer ran the red signal. (R. 559, 560.) However, this fact was known by Jackson only from information relayed by Billingsley (R. 208); he (Jackson) did not personally see the red boards.

The petitioner, on page 10 of its petition for writ of certiorari to this Honorable Court, set forth four (4) statements which it contends were the holdings of the appellate court.

The respondent respectfully submits to this Honorable Court that the United States Court of Appeals for the Fifth Circuit held substantially as follows:

(1) It is improper for a Court to instruct on a proposition of law about which there is no evidence. Such an instruction should be refused.

(2) The complete absence of evidence to show any lack of care on Jackson's part made the giving of the instruction on contributory negligence error. Where the giving of this instruction improperly permitted th jury to find the plaintiff guilty of comparative negligence, the giving of the instruction was prejudicial error.

(3) It is the duty of the Court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the Court.

(4) That a railway mail clerk is as a matter of law, a passenger of the carrier is supported by a great weight of authority and that a person confronted with a sudden peril not arising from any fault of his own will not be held negligent when he exercises the right to take care of himself in order to avoid injury provided he acts with such care as an ordinarily prudent person would exercise.

ARGUMENT.

The respondent respectfully submits to this Honorable Court that the writ of certiorari should be denied. The appellate court has not pre-empted the jury's function in any way in this case, and the spirit and intent of the Seventh Amendment to the United States Constitution has not been violated here. The petitioner makes much comment on conflicting evidence. Respondent respectfully submits that there is no conflict in the evidence as pertains to *material* facts of

this occurrence. There is no doubt that these two (2) trains collided head-on. There is no doubt that both trains belonged to Southern Railway Company, petitioner herein, and were being operated by the Southern Railway Company through its employees. There is no doubt that the first knowledge that the respondent had of the impending collision was just a few seconds before the actual collision occurred. The uncontradicted evidence clearly shows that John Jackson, acting in a sudden emergency, tried to prevent injury to himself by grabbing across two (2) racks. (R. 133.)

The petitioner asserted contributory negligence on the part of the respondent as a defense. (R. 560, 561.) This is an affirmative defense and the burden of proof of this defense of contributory negligence shifts to the party asserting it, and the Southern Railway Company did not carry the burden in this case.

The petitioner keeps bringing forth this argument concerning contributory negligence. However, there is no evidence in the case to show that the pulling of the emergency cord would have prevented the accident or would have diminished the impact between the two (2) trains or lessened respondent's injuries.

This Honorable Court stated in the case of *Herron vs. Southern Pacific*, 283 U. S. 91, 95.

> "In a trial by jury in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purposes of assuring its proper conduct and of determining questions of law. This

discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Storey in the United States v. Battiste, 2 Sumner, 240, 243: 'It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court.'"

In the case of *Whitsell vs. Alexander*, 229 Fed. 2d 47, Headnote 3—Federal Civil Procedure—Keynote 2126:

> "Trial court should grant directed verdict when evidence is such that there are no controverted issues of fact upon which reasonable men could differ, and neither summary judgment nor direction of verdict infringes right to jury trial preserved by the Seventh Amendment to the Constitution where question is one of law."

In the case of *McCarthy vs. Pennsylvania Railroad Company*, 156 Fed. 2d 877 (10)—Trial Keynote 252 (1):

> "An instruction on a proposition of law about which there was no evidence was erroneous."

In the case of *Simler vs. Conner*, which was argued before this Honorable Court on January 9-10, 1963, Volume 372, U. S. No. 1, page 221, it was held that in diversity cases, the substantive dimension of the claim asserted finds its source in state law. See also *Erie Railroad Company vs. Tompkins*, 304 U. S. 64.

The respondent respectfully submits that under the law of Georgia, it is error for a trial court to instruct a jury on contributory negligence where there is no evidence of such negligence. See *Bain vs. Athens Foundry and Machine Works*, 75 Ga. 718, 725; *Healan vs. Bowen*, 91 Ga. App. 787, 793.

Thus, the respondent respectfully submits to this Honorable Court that there was no evidence to support an instruction by the District Court on contributory and comparative negligence. Therefore, the petitioner's rights under the Seventh Amendment to the Constitution of the United States have not been violated by the ruling of the United States Circuit Court of Appeals for the Fifth Circuit.

CONCLUSION.

Respondent respectfully submits that the petition for writ of certiorari filed by the Southern Railway Company, petitioner, should be denied.

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PROOF OF SERVICE.

STATE OF GEORGIA
COUNTY OF FULTON

Before me, the undersigned attesting officer duly authorized to administer oaths, personally appeared R. BEVERLY IRWIN, who after being duly sworn deposes and says that on the .... day of ..... 1963, he served by mail upon Mr. Edgar Neely, 1240 Bank of Georgia Building, Atlanta, Georgia, attorney for petitioner, Southern Railway Company, a copy of the brief of respondent, John H. Jackson, in opposition to granting of certiorari.

R. BEVERLY IRWIN

Sworn to and subscribed before me this .... day of August, 1963.

JOYCE ANN ALLRED
Notary Public